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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ANTHONY NUNEZ,

Defendant and Appellant.

H033971

(Santa Clara County

Super. Ct. No. CC780739)

Defendant Richard Anthony Nunez was convicted by a jury of two counts of forcible oral copulation of a child under 14 years old and 10 or more years younger than the defendant (Pen. Code, §§ 269, 288a),¹ two counts of forcible rape of a child under 14 years old and 10 or more years younger than the defendant (§ 261, subd. (a)(2)) and two counts of committing a lewd or lascivious act on a child under 14 (§ 288, subd. (a)). The jury also found true the allegations that the offenses involved multiple victims. (§ 667.61, subds. (b) & (e).) Nunez was sentenced to a total term of 90 years to life.

On appeal, Nunez argues that the jury was given unconstitutional instructions, namely CALCRIM Nos. 371 and 372, which improperly lowered the prosecution's burden of proof and therefore violated his rights to a fair trial and due process. He also claims that his sentence is unconstitutional, either because the statutes under which he was sentenced, i.e., sections 269 and 667.61, are unconstitutional, or because the sentence

¹ All further unspecified statutory references are to the Penal Code.

itself violates the federal and state constitutional prohibitions against cruel and unusual punishment.

We find no merit to these arguments and shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The prosecution's case

Nunez moved in with the victims' mother in October 1997 and the two were married in February 1999. The victims' mother had three children from a prior relationship: the older victim, who was 10 or 11 years old at the time Nunez moved in, the younger victim, who was then five years old, and the victims' younger brother. Nunez and the mother eventually had three more children together.

The mother worked six days a week, sometimes during the evenings and on weekends, as well. Nunez was employed when he first moved in with the family, and generally looked after the older children while the younger children were taken care of by a babysitter or a nanny. Once he stopped working outside the home, Nunez watched all the children after the babysitter departed, and was often home when the older children got home from school.

1. The younger victim's testimony

The younger victim was 16 years old at the time of the trial. When Nunez moved in with her family, he became the father figure in her life, as she did not have a relationship with her biological father. Nunez would tell her to clean her room or do her chores, and she was expected to obey him.

Soon after moving into the house, Nunez began molesting the younger victim. The molestations took place mostly after school, inside her mother and Nunez's bedroom. Nunez would tell her to come into the bedroom with him, or he would take her into the bedroom himself, either by pulling her by the hand or carrying her. When he took her into the bedroom, the younger victim was afraid, though she never screamed or called out for help.

Once in the bedroom, Nunez would lock the door and then make her orally copulate him. The younger victim did not know if she ever told him no or told him to stop, but she did try to get away from him. Whenever she did, though, he would pull her back.

Nunez would also remove the younger victim's clothes and touch her breasts and vagina with his hands or his penis. He would tell her to get on the bed, and would hold her down on the bed while he touched her. Nunez would move his penis back and forth against her vagina, but she does not think that he penetrated her. She would tell him no and ask him to stop, but he would ignore her.

The younger victim never called out for help or screamed because she was afraid of Nunez. He would get mad at her whenever she tried to get away from him or told him to stop. If that happened, Nunez would punish her by not allowing her to watch television or have a snack, and would "make up something to [her] mom [about why she was being punished]." Almost every time he molested her, Nunez told her not to tell her mother about what was happening. Until July 2007, the younger victim never told her mother or anyone else about what was happening.

When the younger victim was between eight and nine years old, the older victim caught Nunez molesting her. The younger victim had gone out to the shed with Nunez to look for books. She was wearing a dress, but no underwear, because Nunez had told her not to wear any. When they got out to the shed, Nunez sat on a box, pulled his pants down, exposing his penis, and pulled her onto his lap. Nunez's hands were on her waist, and he was moving her up and down. She thinks that his penis went between her labia on this occasion.

While this was happening, the older victim opened the door to the shed. The younger victim thinks the older victim initially said something about her brother needing a diaper change, but then she heard her say she was going to tell their mother. The younger victim got off Nunez's lap and stood next to him. The older victim ran to the

garage and Nunez went after her. The younger victim returned to her room. She later saw Nunez in the hallway, where he told her to wash her vagina, put some underwear on and not to tell anyone. He said if she told anyone, the family would break up and that he would go to jail. That made her feel sad and scared because she wanted her family to stay together.

As a result, when her mother later asked her about the incident, she denied that anything happened. She said that she lied to her mother because she was scared about her family breaking up. The younger victim also lied to her aunt and her uncle for this same reason. She was interviewed by the police on July 27, 2002, but she denied that anything happened. Afterwards, Nunez resumed molesting the younger victim nearly every day.

While in sixth grade, the younger victim wrote a paper about why Nunez should be "Father of the Year." However, she wrote the paper in order to get extra credit for a class in which she had a bad grade. The assignment was to write a paper about a father figure, and she had no other father figures in her life.

When she was about 14 years old, Nunez began molesting the younger victim on the couch in the family room of the house where they were living. Though her younger brothers were sometimes home at the time, Nunez would tell them to go outside to play before removing her clothes and rubbing his penis against her vagina. On one such occasion, one of her younger brothers ran into the house while Nunez was molesting her. Nunez yelled at the boy to go outside, and the boy complied.

Sometimes while Nunez was molesting the younger victim, he would play pornographic movies on the television and make her watch. When she tried to look away or close her eyes, he would yell at her, "Open your eyes and look at it."

In July 2007, the older victim was having an argument with their mother. After their mother screamed at her to get out of the house, the older victim went into the bathroom, crying. The younger victim went in to the bathroom and asked her what was

wrong. The older victim said that their mother was not listening to her and that Nunez had been touching her in inappropriate ways. The younger victim started crying, as well. The older victim asked her if Nunez had been molesting her as well, and the younger victim told her that he had.

After her aunt called the police, the younger victim spoke to a police officer and told him about the molestations.

When she was 12 or 13 years old, she began cutting herself. She was not sure why she did so, but she did say that when she thinks about what Nunez did to her, she felt “[v]ery depressed.”

2. The older victim’s testimony

The older victim was 20 years old at the time of the trial. She believes she was in third grade when Nunez first moved into the house with her mother, the younger victim and her younger brother. Like the younger victim, she did not have a relationship with her real father, so Nunez was the only father figure she had in her life.

When the older victim was between eight and 11 years old, Nunez twice rubbed himself against her. The first time it happened in the hallway of their house. She was walking towards the bedroom and Nunez walked up to her and started grinding his crotch against hers. Both the older victim and Nunez were clothed when this happened. It lasted perhaps a minute and Nunez asked, “Does that feel good?” She was shocked and did not know what to do or how to respond. She did not call out for help or tell him to stop. Nunez just walked away as far as she could recall, though on one of the two occasions he told her not to tell her mom because that was a “special hug” between him and the older victim. She did not tell her mom or anyone else what happened.

The second time, the two were alone in the kitchen and Nunez started grinding his crotch against hers for about a minute. Again, she was shocked and did not call out for help or tell him to stop, nor did she try to get away.

The older victim was aware that what Nunez was doing was wrong, and thought of telling someone. However, she was afraid that they would not believe her or that she might get in trouble.

On one other occasion, Nunez was sitting on the couch in the living room and called the older victim over to feel his crotch through his clothes. She did as she was told, and recalls that his penis felt firm. She walked away. Sometime later that same day, Nunez called her back, told her to feel around his pocket, then pulled a banana out of his pocket and told her that was what she had felt earlier. However, the older victim had not felt in the area around Nunez's pocket the first time, and what she felt earlier was more round than a banana.

When the older victim was a sophomore or junior in high school, she was wearing a low-cut tank top one day and Nunez asked her if she was menstruating because she "looked bloated." She grabbed at her stomach in response, but Nunez gestured in a way that indicated that he was talking about her breasts.

Around that same time, Nunez called her into his room one day, and there was a pornographic movie playing on the television. He told her to look at it, and then asked her how she felt. She either said nothing or that she felt the same. Nunez said that the older victim should consider getting into the pornography business "because people in the porn industry make good money."²

The following year, Nunez gave her a dildo, telling her "If mom finds out, I didn't give it to you." She put it in the back of her closet. Sometime later, Nunez asked her if she had used it, and when she told him she had not, he asked for it back.

² The older victim thought that he made this suggestion at the same time that he called her into the room to watch the pornographic movie, but was not exactly sure of the timing.

During her sophomore year in high school, the older victim got As and Bs, with a couple of Cs. Her mom pulled her out of school her junior year when she started getting failing grades, so she would not “waste people’s time.”

On the day that the older victim walked in on Nunez molesting the younger victim, their mother was at work, and Nunez was the only adult in the house. The younger victim was looking for a book and Nunez suggested that they go look for it in the storage shed in the backyard. The pair was gone for some time and the older victim became angry that she was left to do the cleaning. When the youngest child needed to have his diaper changed, she did not feel like doing that too, so she went out to the shed to find Nunez. The shed door was closed and she opened it to tell Nunez about the diaper. She saw Nunez sitting on a box with his pants down and the younger victim was standing close to him, looking down. The younger victim was wearing a dress, and though she did not see Nunez’s penis, the older victim could see the upper part of his leg which was bare.

Nunez looked angry. The older victim yelled that she was going to tell her mother and she ran inside the house. While she was on the phone with her mother, the younger victim and Nunez came into the house. They stood near her for a time while she was talking on the phone, then moved into a room towards the back of the house. The older victim walked down the hallway and saw Nunez whispering to the younger victim. The older victim asked what he was saying to her, but got no response.

The mother arrived about 10 minutes later. She was trying to figure out what was going on and Nunez was trying to explain, while the older victim was yelling that he was a “pervert.” Eventually, the mother and all the children left the house and went to the mother’s sister’s house.

At her aunt’s house, the older victim told her mom and her aunt everything she had seen in the shed. She recalls that she told her aunt that when she opened the door she saw the younger victim actually sitting on Nunez’s lap, as opposed to standing next to

him. She said that it “happened so fast. . . . [she] just opened the door and saw and kind of ran.”

The older victim felt that her mother did not believe her. When her mother asked if something like that had happened to her, and she described what Nunez had done to her, her mother said, “Why are you saying this? Are you sure your real dad didn’t do this to you?” Her mother also told the older victim that other members of the family, such as her aunt, did not believe she was telling the truth.

When the older victim later met with a police investigator, she told him that she made the entire thing up, because “I felt like no one believed me, and if I--if I was the one who was lying, I was going to get in trouble and there was no way to prove that it was true, because [the younger victim] was saying that it didn’t happen.”

The older victim later asked the younger victim about the shed incident, but the younger victim maintained that it did not happen. She never discussed the incident with her sister again, though the two were otherwise close.

According to the older victim, the younger victim was “quiet” and kept her feelings to herself. The older victim observed that the younger victim’s relationship with Nunez was different than his relationship with the other children, including his own biological children. He would give her more candy or other rewards, and would sometimes do the younger victim’s chores for her. Nunez spent a lot more time with the younger victim, often in his room. This would occur even when other people were home.

At the end of July 2007, the older victim and the rest of her family were preparing to go to the Gilroy Garlic Festival. Nunez went to drop two of the children off at the babysitter’s house. The older victim, who had moved out of the house some time earlier, had acted rudely toward Nunez before he left, so her mother asked her why. The older victim told her that Nunez was mean to the kids, but that even if she had told her that before, she would not believe her. Her mother retorted that that was because the older victim had falsely accused Nunez of molesting her. At that point, the older victim began

to cry and said that it really happened and she believed it happened to the younger victim, too. The older victim went into the bathroom, still crying, and the younger victim joined her. The older victim asked if Nunez had molested her, at which point the younger victim also began to cry and said that he had. The two girls went to their mother and told her Nunez had molested them. The mother told the older victim to leave the room so that she could talk to the younger victim alone.

When Nunez returned to the house, the older victim was sitting in her mother's truck with the younger victim, both of whom were still crying. Nunez went into the house, but he came back out a few minutes later and asked the older victim why their mother was crying. She ignored him and locked the doors to the truck. The victims' aunt was at the house and had called the police. Nunez got into his car and started to drive off. The older victim tried to use her mother's truck to block his car, but was unsuccessful.

3. The victims' aunt's testimony

The victims' aunt testified that in 2002, the victims' mother called her at work and told her that the older victim had reported seeing Nunez "basically violating [the younger victim]" in the shed. The mother and her children then came over to the aunt's house.

Once there, the older victim told her aunt that she had gone into the backyard to check on Nunez and the younger victim. When she entered the shed, she saw Nunez sitting down with the younger victim straddling him and he was humping her.

The mother and the children stayed at the aunt's house for a few days. During this time, the aunt tried to convince the victims' mother to call the police, but she resisted. The victims' uncle also tried to get the mother to contact Child Protective Services or take the younger victim to the hospital, but the mother was afraid that her children would be taken away if she did so. Eventually, she and the aunt got into a physical altercation about it, and the aunt ended up calling the police on her own. She never learned if her report led to any sort of prosecution because the victims' mother cut off all communication with her after that for approximately two years.

In July 2007, the aunt was at the victims' house when the older victim and the younger victim told their mother that Nunez had molested them. The mother asked the aunt to call the police because she was too upset to do it herself. While she was on the phone with the police, Nunez returned, but she told him she was talking to her mother. Nunez tried to talk to the victims' mother, who was upset and crying. The aunt believes that Nunez figured out that the police had been called and he left quickly, nearly getting into an accident with the victims when the older victim tried to block his vehicle with her mother's vehicle.

4. *The maternal grandmother's testimony*

The maternal grandmother testified that she lived with the family for a couple of months around the time that Nunez first moved in with the victims' mother, and several years later, stayed with the family three or more days a week to help with cooking and cleaning. She recalls that the mother worked nine hour days at her banking job, and when the mother started working in real estate, she would work from 8:00 in the morning until 9:00 at night. She would also work on the weekends sometimes.

The grandmother noticed that Nunez treated the younger victim differently than the other children and was much more affectionate with her. She was aware that there were times that Nunez was alone with the younger victim at the house, and sometimes, if she had not seen the younger victim for a while, she would worry and call for her. On such occasions, it might have taken the younger victim five minutes to respond to the grandmother's calls.

5. *Mary Ritter's testimony*

Ritter, a physician's assistant at the center for Child Protection at Santa Clara Valley Medical Center, testified as an expert in the area of forensic sexual assault examinations.

On July 31, 2007, Ritter conducted a sexual assault examination on the younger victim. Ritter noted that the younger victim had healing scars on her left forearm, which

the younger victim said were from cutting herself. There was no evidence of injury to the younger victim's vaginal or anal areas, though the absence of injury was not dispositive of whether or not penetration had occurred. Ritter testified that it was possible for a hymen to be bruised, instead of torn, and for that injury to heal. Also, if a penis merely went between the labia, rather than entering the vaginal canal, one would not expect to see any corresponding vaginal injury, including bruising. Ritter also stated it was possible to have penile or digital penetration of the vaginal canal without rupturing the hymen or causing other evidence of injury.

6. *Child sexual abuse accommodation syndrome evidence*

Carl Lewis testified as an expert on the subject of child sexual abuse accommodation syndrome, or CSAAS. CSAAS consists of a "general base of knowledge based on clinical observation[, and] is intended to assist people looking at a reported case of sexual abuse to assist them in understanding some of the unexpected conditions or behaviors that might present themselves in those types of cases." The syndrome is not a diagnostic tool and it cannot be used to determine whether or not a particular child has, in fact, been molested.

CSAAS consists of five categories: secrecy; helplessness; entrapment and accommodation; delayed, conflicted, unconvincing disclosure; and retraction. Not all child victims display behaviors associated with all five categories in every case, however. Secrecy relates to the fact that the abuse occurs almost exclusively when the child is alone with the offender and the offender will often create the environment which isolates the child, which reinforces a message to the child that the behavior is wrong or bad. In addition, the offender will often instruct the child not to reveal the conduct, sometimes threatening that "bad things will happen" if they tell.

The category of helplessness describes the victim's inability to successfully resist the molestation, either physically or emotionally, especially where the offender occupies a position of trust or authority in the victim's life. The victim will sometimes send out

indications that something is wrong, e.g., refusing to be alone with the offender, but when those indications are ignored or rejected, the feeling of helplessness is further reinforced.

The third category of entrapment and accommodation is exhibited in that the child, unable to escape from ongoing abuse or carrying the secret of prior acts of molestation, finds a way to accommodate the situation. The child will act as if nothing is wrong or affirmatively deny that anything is wrong.

The fourth category is the delayed, conflicted or unconvincing disclosure, where the child waits to disclose the abuse, rather than immediately reporting it. This delay is a consequence of the enormity of the issues confronting the child, such as the fear of not being believed, the fear that the offender will make good on his or her threats, or the fear that the family will break apart and that it will be the victim's "fault."

Further, when a disclosure is made, it is often made at a time or in a manner which seems unconvincing, such as when the child is being punished for some reason.

Finally, retraction can occur due to the intense scrutiny on the child and the family which is generated by the child's disclosure. Law enforcement, child protective services, medical and psychiatric services are all invoked, and there may be some suggestion to the child by family members, not to mention the offender, that the victim is responsible for all this attention and turmoil in the family's life. The child victim may then attempt to restore the status quo and "make things better" by minimizing the abuse or denying it completely.

B. Defense case

The victims' mother was the sole witness to testify for the defense. She reported that she never observed any inappropriate interaction between Nunez and either of the victims. Over the years, she hired nannies to help care for her children, some on a full-time basis, but none of the nannies she spoke to reported any inappropriate behavior by Nunez. In her opinion, Nunez treated all of the children the same, with the exception of one of his biological sons, who seemed to be his favorite.

At one point in time, she offered the younger victim a part-time summer job working in her real estate office, but the younger victim refused, and the mother believed that the younger victim was happy staying at home with Nunez.

Respecting the incident in the shed, the mother testified that, after she got home, she separated everyone and tried to find out what occurred. The younger victim denied that anything happened, as did Nunez. When she confronted the older victim with the younger victim's denial, the older victim said nothing. She did not call the police because the younger victim denied that anything occurred, and she did not want Child Protective Services to take her children away.

After her sister called the police, she was contacted by an investigator and brought her two daughters in for an interview. Before she took them in, she told them that "they had better tell the truth," though she admitted this was after she had told the older victim that she "knew she was lying [about seeing Nunez molest the younger victim]." After he met with the two girls, the investigator told the mother that nothing had happened and that the older victim was lying about what she claimed to have seen happening in the shed.

The mother subsequently cut off all contact with her sister and her own mother for approximately two years because they insisted that Nunez had molested her two daughters. The mother said that the nannies always told her that "my girls were hard to handle and [Nunez] always took care of them."

The mother also testified that she asked the older victim and the younger victim several times afterwards whether Nunez had molested the younger victim in the shed, but they both assured her nothing had happened.

The older victim later moved out of the house, but when she would come over to visit, the mother would notice a tension in the air. The mother asked her to "have more respect when she came into our home," and the older victim began arguing with her. The older victim began telling her that she had seen Nunez molesting the younger victim in

the shed, and the mother asked the younger victim to tell her what was going on. The younger victim said that it was true and the mother got very upset and asked her sister to call the police.

The mother thinks she shouted at Nunez when he came home, but she could not recall what she said. Nunez tried to leave in her car, and the mother saw the older victim in the SUV trying to block him.

After the molestation was reported in 2007, the mother did not seek counseling for the younger victim, but maintained that it was because the younger victim did not want it. The mother also testified that she was unaware that the younger victim was cutting herself, and never noticed any cuts on her arms. She also was not aware that one of her sons had serious emotional issues that would require counseling.

C. Rebuttal

Deputy Shawn Harrington of the Santa Clara County Sheriff's Department testified that he spoke to the mother on July 27, 2007, when he responded to investigate allegations of ongoing sexual abuse. According to his report, the mother told him that when Nunez came home on that day after the victims had told her about his molesting them, she asked him, "How could you do this?" The mother then said that Nunez looked around at the family members, particularly the victims, got a scared look on his face and left the house.

Detective Tony Hickman testified, when he spoke to the mother in February 2008, she never told him that the younger victim did not want to go to counseling. At first, she told him that she had not received funding from the victim witness program to pay for the counseling, but when he informed her that it was his understanding that the funding was approved, she did not respond. When Hickman told her the YWCA offered free counseling through a rape crisis center, she said that the appointments would require her to take time off work and "she just couldn't do that."

II. DISCUSSION

A. *CALCRIM Nos. 371 and 372*

The trial court instructed the jury pursuant to CALCRIM No. 371 as follows: “If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.”

The trial court further instructed the jury pursuant to CALCRIM No. 372 as follows: “If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.”

Nunez contends that these instructions impermissibly invaded the jury’s province and lowered the prosecution’s burden of proof, since they refer to him being “aware of his guilt.” According to Nunez, such awareness could only exist if he was, in fact, guilty, and the instructions therefore violated his constitutional rights to a fair trial and due process.

Nunez acknowledges that the predecessor instructions--CALJIC Nos. 2.06 and 2.52--have been approved by the California Supreme Court, but those instructions did not

utilize the phrase “aware of his guilt.”³ He also acknowledges that, at least as to CALCRIM No. 372, his argument has been rejected by our sister court in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154.

We do not agree that the use of the phrase “aware of his guilt” renders CALCRIM Nos. 371 and 372 unconstitutional. Leaving aside the question of whether there are substantive differences between these instructions and the predecessor CALJIC instructions, we believe the issue is easily resolved by looking at the language which immediately precedes the challenged phrase.

In CALCRIM No. 371, the jury was instructed that “If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct *may show* that he was aware of his guilt.” (Italics added.) Similarly, in CALCRIM No. 372, the jury was instructed, “If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct *may show* that he was aware of his guilt.” (Italics added.) The italicized language in each instruction is permissive, not directory. Consequently, the instructions permitted, but did not require, the jury to conclude that Nunez’s suppression of evidence and flight showed an awareness, or consciousness, of guilt.

³ CALJIC No. 2.06 provides, in pertinent part, as follows: “If you find that a defendant attempted to suppress evidence against [himself] . . . in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] . . . , this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

CALJIC No. 2.52 provides, in pertinent part, as follows: “The [flight] . . . of a person [immediately] after the commission of a crime, or after [he] . . . is accused of a crime, is not sufficient in itself to establish [his] . . . guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.”

The cases Nunez cites in support of his argument are distinguishable as they involved instructions which impermissibly directed the jury to make certain findings of fact. For example, in *Carella v. California* (1989) 491 U.S. 263, the trial court instructed the jury that “ ‘[w]hensoever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person *shall be presumed to have embezzled the vehicle.*’ ” (*Id.* at p. 264, italics added.) This instruction was improper because it was mandatory, rather than permissive. (*Id.* at pp. 265-266.)

In *People v. Godinez*, the jury was instructed that “ ‘[h]omicide is a reasonable and natural consequence to be expected in a gang attack.’ ” (*People v. Godinez* (1992) 2 Cal.App.4th 492, 501.) The instruction was erroneous because it did not allow the jury to determine for itself whether or not homicides are, in fact, reasonable and natural consequences of gang attacks. (*Id.* at p. 502.)

Similarly, in *People v. Higareda*, the trial court instructed the jury, in a robbery case, that the “ ‘aiming of a handgun or shotgun at a victim accompanied by a demand and receipt of money or personal property amounts to force and inferably fear, within the meaning of Penal Code [section] 211.’ ” (*People v. Higareda* (1994) 24 Cal.App.4th 1399, 1406.) On appeal, the court held that the instruction was improperly “fact intrusive,” though it ultimately determined the error was harmless beyond a reasonable doubt. (*Ibid.*)

As the California Supreme Court observed, albeit in connection with a challenge to CALJIC Nos. 2.04 and 2.52, “[c]ontrary to defendant’s claims, the instructions do not suggest that evidence of a defendant’s consciousness of guilt serves to support an inference of the existence of a particular mental state or degree of culpability.” (*People v. Martinez* (2009) 47 Cal.4th 399, 450.) Here, the jury was allowed to decide whether Nunez attempted to hide evidence and whether he fled when confronted with an accusation of a crime, and was also allowed to decide what importance, if any, to attach

to those facts. We presume the jury understood and followed the instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

B. Sentence

In anticipation of sentencing, the older victim provided a written statement which the prosecutor read into the record. The statement described her emotional scars and expressed her wish that Nunez spend the rest of his life in prison.

The probation presentencing report detailed Nunez's criminal record, which consisted of a felony conviction, two misdemeanor offenses and various infractions, none of which involved sexual offenses. The report also listed various factors in aggravation including that Nunez took advantage of a position of trust and that his prior convictions were numerous or of increasing seriousness. (Cal. Rules of Court, rules 4.421(a)(11), 4.421(b)(2).) The lone factor in mitigation was that Nunez's prior performance on parole or probation was satisfactory. (Cal. Rules of Court, rule 4.423(b)(6).)

Nunez declined to make a statement regarding the crimes, and thus it was unknown whether he was remorseful about the harm he had caused to the victims.

Nunez was sentenced to an aggregate term of 90 years to life, consisting of consecutive terms of 15 years to life on each of the six counts.

Nunez contends that this sentence violates the state and federal constitutional prohibitions against cruel and/or unusual punishment. He further argues that sections 269 and 667.61 are facially unconstitutional, or in the alternative, their application to him constitutes cruel and/or unusual punishment.

The Attorney General points out that Nunez did not object to his sentence on these grounds and, therefore, should be deemed to have forfeited the argument. Nunez responds that the claim should be considered as a claim of ineffective assistance of counsel. We shall consider the argument on that basis.

1. *Cruel and unusual punishment*

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishments described as “unnecessary and wanton infliction of pain” or punishment “grossly out of proportion to the severity of the crime.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) Our state Constitution similarly provides that neither cruel nor unusual punishment should be inflicted. (Cal. Const. art. I, § 17.)

In California, “courts should (1) consider ‘the nature of the offense and/or the offender’ [citation], (2) compare the punishment to other punishments imposed by the same jurisdiction for more serious offenses [citation] and (3) compare the punishment to other punishments imposed by other jurisdictions for the same offense.” (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) The California Constitution is violated only where the punishment is so disproportionate “that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Here, the “nature of the offense” involved Nunez’s molestation of his two stepdaughters, one of whom was only five or six years old when the molestation began. Nunez points out, apparently as mitigating circumstances, that these molestations were not violent attacks nor was there any evidence he inflicted any *physical* harm on the victims. He also notes that his sentence is greatly in excess of the 25-years-to-life sentence he would receive for committing first degree murder.

2. *Sections 269 and 667.61*

Section 269 was enacted to increase the punishment for certain enumerated forcible sexual acts where there is substantial age disparity between the offender and the minor victim. (*People v. Jimenez* (2000) 80 Cal.App.4th 286, 291.) The statute requires a sentence of 15 years to life for any defendant who commits specified sexual offenses against a child under the age of 14 where the defendant is 10 or more years older than the victim. (§ 269, subd. (b).) Nunez was subject to the mandatory term under this statute

because he was convicted of aggravated sexual assault of a child based on his acts of raping one of his stepdaughters and forcing her to orally copulate him.

Section 667.61, subdivision (b) also provides for a mandatory sentence of 15 years to life whenever a defendant is convicted of one of the serious sexual offenses enumerated in subdivision (c) and the prosecution establishes one of the circumstances set forth in subdivision (e). Nunez was subject to the mandatory sentencing provisions of this statute by virtue of his being convicted of committing a lewd or lascivious act on a child under age 14 and because there were multiple victims.⁴

Nunez argues that these statutes are unconstitutional as they are mandatory and fail to allow for variation in sentencing depending on the severity of the offense or the existence of mitigating factors. We disagree.

The mere fact that a one strike sentence “is mandatory merely reflects the Legislature’s zero tolerance toward the commission of sexual offenses against particularly vulnerable victims. It does not, however, render a defendant’s sentence excessive as a matter of law in every case.” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 200-201.) The sentences prescribed under the one strike law have been held to be “precisely tailored to fit crimes bearing certain clearly defined characteristics.” (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1280.)

Nunez also points to his “minor” criminal record in support of his argument that his punishment is unconstitutional, but it is well-settled that “[t]he lack of a significant prior criminal record is not determinative in a cruel and unusual punishment analysis.” (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17.)

⁴ Committing a lewd or lascivious act on a child under 14 is a violation of subdivision (a) of section 288, one of the crimes listed in subdivision (c) of section 667.61. Committing a listed offense against more than one victim is a circumstance found in subdivision (e) of section 667.61.

Nunez's argument that his punishment is more severe than that imposed on someone who commits murder is also unavailing. The argument is based on the fact that Nunez's *aggregate* sentence exceeds the 25 years to life imposed for first degree murder and the 15 years to life imposed for second degree murder. However, Nunez was subjected to the punishment of the one strike law because he committed *multiple* sex offenses against *multiple* victims, and his sentence consists of six *separate* consecutive 15 year to life terms. Presumably, if Nunez committed multiple murders, whether in the first or the second degree, his aggregate sentence for those crimes would be harsher than the sentence imposed herein.

Nunez abused his position of trust to sexually abuse his two stepdaughters, including raping and forcing the younger victim to orally copulate him on multiple occasions, beginning when the victim was five or six years old and continuing over the next 10 years or so. He made both girls watch pornography and even provided the older victim with a sex toy, apparently in an attempt to arouse them sexually. Though there was no evidence that Nunez caused any physical injury to either victim, the enormous emotional and psychological trauma he undoubtedly inflicted on the victims cannot be discounted. In some ways, such injuries are, perhaps, worse than physical injuries as their amelioration cannot be measured as objectively as say, the knitting of a broken bone or the fading of a bruise.

Under the circumstances of this case, we cannot say that the sentence imposed on Nunez is constitutionally defective.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.